No. 48859-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TOMMY LEE CROW, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 08-1-00585-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's Finding of Fact Pursuant to Jury Special Verdict is insufficient to satisfy the requirement of RCW 9.94A.535 that the court set forth, in writing, its reasons for imposing a sentence outside the standard range.

2. Whether the trial court, on resentencing, improperly based the sentence imposed in part on an aggravating factor that had been vacated by the Court of Appeals.

3. Whether the exceptional sentence imposed was clearly excessive.

4. Whether this court should impose appellate costs.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case, with the following additions:

At issue in this appeal is the exceptional sentence imposed for aggravating factor of deliberate cruelty. That aggravator was based upon evidence that the persons who killed Norman Peterson inflicted excruciating pain on him before his death by not only breaking his left ankle but essentially amputating his foot. CP 63-78. This was accomplished either by a single massive blow with a blunt object, or multiple lesser blows. CP 71. The cause of death was asphyxiation, most likely as a result of manual strangulation. CP 78. The injury to Mr. Peterson's leg was unnecessary to accomplish his death.

C. ARGUMENT.

1. The trial court made the only finding of fact that it could possibly have made. The aggravating factor was found by the jury; the trial court was not the finder of fact.

a. Finding of Fact and Conclusion of Law.

The aggravating factor of deliberate cruelty was submitted to the jury, which found beyond a reasonable doubt that it occurred. CP 61. Following remand for resentencing, the trial court imposed an exceptional sentence based upon that aggravator, making the following Finding of Fact Pursuant to Jury Special Verdict:

> 1. The exceptional sentence is justified by the following aggravating circumstance: (a) the defendant's conduct during the commission of this crime manifested deliberate cruelty to the victim, Norman Peterson. RCW 9.94A.535(3)(a).

CP 215.

Crow argues on appeal that the court did not make oral or written findings that specifically supported the reasons for a finding of deliberate cruelty, such as the injuries sustained by Mr. Peterson. Appellant's Opening Brief at 11-12.

> To reverse an exceptional sentence, we must find either that "the reasons supplied by the sentencing court are not supported by the record which was before the judge or that the reasons do not justify a sentence outside the standard range for that offense"

> or that "the sentence imposed was clearly excessive or clearly too lenient."

State v. Pappas, 176 Wn.2d 188, 191-92, 289 P.3d 634 (2012), quoting State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). "The legal sufficiency of a sentence is reviewed de novo." Pappas, 176 Wn.2d at 192. Whether the record supports an exceptional sentence is reviewed under a clearly erroneous standard, and review of the length of the sentence is reviewed under an abuse of discretion standard. State v. Kolesnik, 146 Wn. App. 790, 803, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050, 208 P.3d 555 (2009).

RCW 9.94A.535 gives the trial court the discretion to impose an exceptional sentence under specified conditions ("The court *may* impose a sentence outside the standard range . . .", emphasis added). The statute requires that "[w]henever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." These findings are necessary for a reviewing court to determine if the record supports the trial court's imposition of the exceptional sentence. State v. Woody, 48 Wn. App. 772, 776, 742 P.2d 133 (1987), *review denied*, 110 Wn.2d 1006 (1988). The appellate

court then makes an independent determination that the court's reasons are "substantial and compelling" enough to justify the exceptional sentence. Id.

Contrary to Crow's argument, however, the statute requires the court to state the reasons for its decision to go outside the standard range, not the individual facts leading to the finding that the aggravating factor exists. In this case the trial court was not the finder of fact. The jury found that the aggravating factor of deliberate cruelty had been proved beyond a reasonable doubt, as required by Blakely v Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). CP 61. The sentencing court could not simply ignore that finding, but it did have to decide whether, under the facts of this case, the factor of deliberate cruelty justified an exceptional sentence and, if so, what that sentence should be. It did so by making the finding of fact that Crow's conduct justified an exceptional sentence and the conclusion of law that there were substantial and compelling reasons to impose an exceptional sentence. CP 215.

In his personal restraint petition, Crow did not challenge the aggravating factor of deliberate cruelty. In re Pers. Restraint of Crow, 187 Wn. App. 414, 349 P.3d 902 (2015). The Court of

Appeals held that there was insufficient evidence of the Good Samaritan aggravator and that the trial court had improperly considered Crow's potential good time credit, the sentence on both counts of second degree murder were remanded for resentencing. It did not address the deliberate cruelty aggravator. Id. at 426. However, as noted, while the resentencing court was free to impose an exceptional sentence, or not, on the charge carrying the deliberate cruelty aggravator, it was not free to disregard the jury finding that the aggravator has been proved.

It is true that the sentencing court did not speak to the facts of the case at any great length. 04/21/16 RP 47-57. However, it is clear from the record of the resentencing hearing that the judge, both counsel, the defendant, and the family members of the victim were very familiar with the facts of the case. The court had reviewed the entire file of the case. 04/21/16 RP 47. The State had submitted a lengthy memorandum that explained the case thoroughly, attaching portions of the trial transcript. CP 46-202. There was no need for a great deal of discussion, which could only have increased the pain felt by the family members of the two victims, several of whom were present at the resentencing. 04/21/16 RP 4-5. There is a substantial record available to a

reviewing court, enabling it to determine whether that record supports the imposition of an exceptional sentence, as well as the length of that sentence.

The court specifically found that the single aggravating factor of deliberate cruelty justified an additional 115 months added to the top of the standard range for the charge pertaining to Norman Peterson. 04/21/16 RP 52-53. It agreed with the judge who imposed the first sentence that either aggravator alone would justify that amount of time. Id. at 53. There cannot have been any basis for this conclusion other than that deliberately severing the foot of a living human being by means of beating it with a blunt instrument justified this sentence, even if the court did not explicitly say so.

b. Remedy for statutory violation.

Crow does not claim that there is not sufficient evidence to support the aggravator of deliberate cruelty, only that there has been a statutory violation of the procedure for imposing an exceptional sentence based upon it. He argues that the remedy is to remand for resentencing. Appellant's Opening Brief at 12. He cites to no authority for that proposition. Even if there were a statutory violation, which the State does not concede, that would not be the remedy.

The oral opinion and the record of the hearing may be sufficient to substitute for written findings and conclusions. State v. Bluehorse, 159 Wn. App. 410, 422-23, 248 P.3d 537 (2011). In Bluehorse, the jury found that an aggravating factor had been proved. Id. at 420. The trial court imposed an exceptional sentence but did not enter any written findings of fact or conclusions of law to support the sentence. Id. at 422. The Court of Appeals, while noting the mandatory requirement of RCW 9.94A.535, also recognized that in the context of CrR 3.5 hearings, a failure to enter written findings and conclusions can be harmless where the trial court's oral opinion, along with the record of the hearing, are sufficient to make written findings and conclusions a "mere formality." Id. at 423, quoting State v. Hickman, 157 Wn. App. 767, 771 n.2, 238 P.3e 1240 (2010). The Bluehorse court found that the trial court's oral ruling was clear enough to permit effective review on appeal "because it stated that the jury's finding of the gang aggravator supported imposition of an exceptional sentence. Therefore, we do not remand for entry of written findings and conclusions." Bluehorse, 159 Wn. App. at 423.

A similar result was reached in State v. Smith, 82 Wn. App. 153, 916 P.2d 960 (1996). In that case the defendant challenged

his 100-year exceptional sentence on the grounds that the court had failed to specify the sentence for each of the four counts to which he pled guilty, and there were no written findings and conclusions to explain the basis for the 100-year figure. The Court of Appeals found that the failure to divide the 100 years among the charges indicated that the trial court imposed 100 years on each charge, and that the report of proceedings, the score sheet, and the trial court's oral ruling were sufficient to make the court's basis clear. Id. at 159. The Smith court further cited to In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986) for the principle that "an appellate court may look to the oral decision of the trial court to clarify the basis of a written ruling." Smith, 82 Wn. App. at 159.

In other cases, where the trial court failed to enter any written findings and conclusions regarding the imposition of an exceptional sentence, the appellate courts have remanded for entry of such findings and conclusions. State v. Shemesh, 187 @n. app. 136, 148, 347 P.3d 1096, *review denied*, 184 Wn.2d 1007, 357 P.3d 665 (2015) ("Permitting verbal reasoning—however comprehensive—to substitute for written findings ignores the plain language of the statute. . . Accordingly we remand for the trial court to enter written findings of fact and conclusions of law.") The same

result was reached in State v. Friedlund, 182 Wn.2d 388, 395, 341 P.3d 280 (2015), a consolidated appeal ("Here, the records of both pending cases are devoid of written findings. The remedy for a trial court's failure to enter written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions.").

In this case the court did enter a finding of fact and a conclusion of law. They were necessarily brief because the jury made the findings of fact. Even if this court finds them insufficient, the remedy is to remand the matter to the trial court for entry of more comprehensive findings and conclusions, not to remand for resentencing.

2. The resentencing court did not improperly consider factors related to the Good Samaritan aggravating factor in imposing the exceptional sentence.

Crow argues that the trial court improperly gave weight to the factors relating to the Good Samaritan aggravator, which the Court of Appeals vacated. He apparently bases this argument on the fact that the family members of David Miller were allowed to speak at the sentencing hearing and the fact that the court imposed the same number of month for the deliberate cruelty aggravating factor that the original sentencing judge had imposed for two aggravating factors. Appellant's Opening Brief at 12-16.

The family members of David Miller were victims. Victims have the right to be heard. State v. Smith, 177 Wn.2d 533, 553, 303 P.3d 1047 (2012), Gonzalez, J., concurring in result. The fact that the court allowed them to speak does not necessarily mean that it considered the Good Samaritan factor in deciding the sentence. The court referred to both victims as heroes. 04/21/16 RP 51. The court also specifically said that "based upon my review of those factors that justify—excuse me—of those facts that justify the exceptional sentence and the aggravator that remains valid in this case shows that it does justify the extra 115 months." 04/21/16 RP 53. Despite the court's plain language, Crow asserts that the court must have considered the Good Samaritan aggravator because the court imposed the same sentence as Crow received in his first sentencing, minus the 60 months to offset any good time. Appellant's Opening Brief at 16.

A reviewing court should be able to take a trial court at its word. This court said it was relying solely on the deliberate cruelty factor. The original sentencing judge said that he believed the total amount would have been appropriate for either aggravator alone, but because there were two, he divided the time between them rather than making the exceptional sentence even longer. CP 189-

91. Finally, it cannot be said that it makes no sense to impose an additional 115 months for the gratuitous brutality inflicted on Mr. Peterson. There is no exchange rate between pain and incarceration time.

Crow makes the distinction between the two victims here and the one victim in State v. Burkins, 94 Wn. App. 677, 973 P.2d 15 (1999). But that is a distinction without a difference. The focus was on Crow's conduct, not the number of victims or aggravating factors per victim. The amputation of Mr. Peterson's foot was sufficiently egregious to justify an exceptional sentence of an additional 115 months above the top of the standard range.

3. The exceptional sentence imposed on Count 2 was not excessive.

Whether an exceptional sentence is clearly excessive is reviewed for an abuse of discretion. State v. Vaughn, 83 Wn. App. 669, 680, 924 P.2d 27 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997). If the record supports the exceptional sentence it will be reversed only if the sentence is one no reasonable person would have imposed or if it is based on untenable grounds or for untenable reasons. Id. at 680-81. The trial court has "all but unbridled discretion" to set the length of an exceptional sentence.

State v. Creekmore, 55 Wn. App. 852, 864, 783 P.2d 1068 1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990). The statutory maximum is the only upper limit to the discretion of the trial court in "egregious cases." Id. at 866. The trial court is not required to give "any specific reason for the exact number of years imposed as long as the length of the sentence is 'reasonable' in light of the egregious facts . . . " State v. Scott, 72 Wn. App. 207, 220, 866 P.2d 1258 (1993), *overruled in part on other grounds,* State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), citing to Creekmore.

Even if the sentencing court does not enumerate the reasons for imposing the length of the sentence, those reasons may be "implicit in the record." Scott, 72 Wn. App. at 221.

> As long as the sentencing court relies solely on valid aggravating factors, that is does not rely on any inappropriate factors, . . . and so long as the duration of the sentence does not exceed the statutory maximum or otherwise shock the appellate court's conscience in all the circumstances of the case being reviewed, it cannot be said that the sentence, although harsh, is so clearly excessive that no reasonable person would have imposed it.

Id.

In this case, Norman Peterson was killed because he stumbled upon the murder of David Miller. His foot was left

attached to his leg only by a strip of skin, an injury that was inflicted before he died and certainly caused extreme pain. CP 68-78. It cannot be said that no reasonable person would impose an additional 115 months above the top of the standard range. The judge who imposed Crow's original sentence said he would do so if deliberate cruelty was the only aggravating factor. CP 191. This sentence does not shock the conscience. It should be affirmed.

4. The imposition of appellate costs is not dependent on the determination of ability to pay. However, under the facts of this case, the State will not seek appellate costs should it substantially prevail on appeal.

Crow asks this court not to impose appellate costs in the event the State prevails on appeal, arguing that he is indigent and will never be able to pay those costs.

Under RCW 10.73.160(1), this court "may require an adult offender convicted of an offense to pay appellate costs." As this court has recognized, the statute gives this court discretion concerning the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); *see* State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant claims that because the trial court found him to be indigent, costs should presumptively be denied. This

argument ignores both the language and the history of RCW 10.73.160.

First, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is "An Act Relating to indigent persons." Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295

(1989). In civil cases, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn. App. 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case. It refused to award costs because "this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved." NECA, 65 Wn.2d at 23.

In Moore, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: "While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and

will not be permitted to recover costs on this appeal." Moore, 66 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the

statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents routine issues of sentencing error.

The defendant litigated the case for his own benefit, not for any public interest. Nothing in this case supports permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

Nevertheless, the State recognizes that Crow is unlikely to pay even the mandatory costs imposed at sentencing. CP 208-09. The costs of attempting to collect appellate costs would likely exceed any amount that he actually pays. Therefore, the State will not ask for appellate costs should the State prevail in this appeal.

D. CONCLUSION.

The trial court did not err in imposing this exceptional sentence. The State respectfully asks this court to affirm that sentence.

Respectfully submitted this 13th day of December, 2016.

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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent on the date below as follows:

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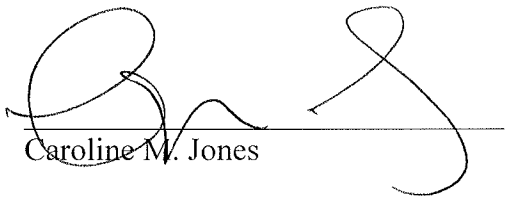
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of December, 2016, at Olympia, Washington.



Caroline M. Jones

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